

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

1			
2			
3			
4			
5			
6			
7			
8	SIDNEY D. JENKINS, III,)	
9)	
10	Plaintiff,)	No. CV-08-5075-CI
11)	
12	v.)	REPORT AND RECOMMENDATION FOR
13)	ORDER GRANTING PLAINTIFF'S
14	ELDON VAIL, GREG GARRINGER,)	RENEWED MOTION FOR TEMPORARY
15	JEFF UTTECHT, STEVE)	RESTRAINING ORDER AND
16	SINCLAIR, STEVE BARKER, JUAN)	PRELIMINARY INJUNCTION
17	PALOMO, SANDI JACOBSEN, D.)	
18	FEDDERSON, ROBERT PIN, K.)	
19	JURGENSON, E. CREWSE,)	
20	JERMAINE BROWN, and JEFF)	
21	SCHUETZE,)	
22)	
23	Defendants.)	
24)	

BEFORE THE COURT is Plaintiff's renewed Motion for Temporary Restraining Order and Preliminary Injunction. (Ct. Rec. 58.) Plaintiff, a prisoner at the Washington State Penitentiary (WSP), appears pro se; Washington State Assistant Attorney General Daniel Judge represents Defendants. The parties have not consented to proceed before a magistrate judge.

BACKGROUND

Plaintiff filed an Amended Complaint on December 30, 2008, alleging Defendants have violated his federal rights under the First Amendment of the United States Constitution and the Religious Land

1 Use and Institutionalized Persons Act (RLUIPA). (Ct. Rec. 19.) On
2 February 2, 2009, the court permitted Plaintiff to proceed and
3 directed service on Defendants and the Office of the Attorney
4 General for the State of Washington. (Ct Rec. 24.) Defendants
5 filed their Answer on April 2, 2009. (Ct. Rec. 44.)

6 Plaintiff now seeks injunctive relief to prevent future
7 disciplinary action and the withholding of privileges by WSP
8 officials based on his refusal to participate in work or educational
9 programming. He asserts his sincerely held religious beliefs
10 prevent him from supporting a non-Islamic government. Plaintiff
11 asserts WSP officials have repeatedly offered him jobs, which he
12 refused based on his religious convictions. He was infracted, found
13 guilty and punished with disciplinary sanctions for each refusal and
14 each infraction. (Ct. Rec. 22 at 2-3.) Plaintiff states the
15 imposed sanctions included loss of earned time and good time; loss
16 of day room and yard time; and loss of recreation, prison store and
17 library privileges. (Ct. Rec. 22 at 2; Ct. Rec. 66 at 6.) He
18 asserts prison policy mandates that inmates who refuse to work for
19 non-medical reasons be assigned to their cell from 8:00 a.m. until
20 4:30 p.m. daily, and there is no authority for repeated infractions
21 and sanctions. (Ct. Rec. 22 at 7, 11; Ct. Rec. 57 at 2.)

22 Plaintiff further alleges that although he has not been offered
23 a job since January 9, 2009 (which resulted in infraction and
24 sanction) (Ct. Rec. 66 at 6), and Defendants appear to have granted
25 him the "narrowly drawn relief he seeks" (Ct Rec. 22 at 6),
26 Defendants are "now denying Jenkins the privilege to transfer to
27 medium custody" due to his refusal to work due to religious reasons.

1 (Ct. Rec. 66 at 6.) He seeks a preliminary injunction to prevent
2 further substantial burden on his religious exercise.

3 Defendants respond that Plaintiff has not met the criteria for
4 prospective relief under the PLRA or the criteria for a restraining
5 order under FED R. CIV. P. 65. (Ct. Rec. 64 at 6, 8.) They argue
6 Plaintiff's request is not narrowly drawn and violates the mandatory
7 requirements of State law. (Ct. Rec. 64 at 8.) They also argue
8 Plaintiff has not shown irreparable injury because (1) he is not
9 working, and has not worked for over a year, so he has not violated
10 his religious beliefs; and (2) he can participate in educational
11 programming, rather than work at a prison job. (*Id.* at 9.)
12 Defendants appear to assert Plaintiff has not experienced
13 irreparable harm by receipt of multiple infractions or assignment to
14 cell during the day because he has requested cell assignment. (*Id.*)
15 They also state that, as of May 22, 2009, Plaintiff is no longer
16 assigned to his cell, can move around freely and is "not restricted
17 during the day." (Ct. Rec. 64 at 14, Ex. 1, Declaration of Lori
18 Scamahorn.)

19 INJUNCTIVE RELIEF

20 The court has broad discretion to grant or deny a preliminary
21 injunction. *Half Moon Bay Fisherman's Marketing Assn. v. Carlucci*,
22 857 F.2d 505, 507 (9th Cir. 1988); *Wyckoff Co. v. Environmental*
23 *Protection Agency*, 796 F.2d 1197, 1198 (9th Cir. 1986); *Dollar Rent*
24 *a Car of Washington v. Traveler's Indemnity Co.*, 774 F.2d 1371, 1374
25 (9th Cir. 1985). The primary purpose of a preliminary injunction
26 is to prevent irreparable harm which may occur before a decision on
27 the merits can be rendered by the trial court.

1 A party seeking a preliminary injunction must fulfill one of
2 two standards: the "traditional" standard or the "alternative"
3 standard. *Cassim v. Bowen*, 824 F.2d 791, 795 (9th Cir. 1987).
4 Under the traditional standard, a court may issue preliminary
5 injunctive relief if it finds (1) the moving party will suffer
6 irreparable injury if the relief is denied; (2) the moving party
7 will probably prevail on the merits; (3) the balance of potential
8 harm favors the moving party; and (4) the public interest favors
9 granting relief. *Id.*

10 Under the alternative standard, the moving party must show
11 either (1) a combination of probable success **and** the possibility of
12 irreparable injury, or (2) the existence of serious questions **and**
13 the balance of hardship tips sharply in its favor. *Warsoldier v.*
14 *Woodford*, 418 F.3d 989, 993-94 (9th Cir. 2005). However, these two
15 articulations under the alternative standard are not two distinct
16 tests, but are "merely extremes of a single continuum." *Wyckoff*
17 *Co.*, 796 F.2d at 1198. In other words, at the "irreducible
18 minimum," the moving party must demonstrate "a fair chance of
19 success on the merits" or "questions . . . serious enough to require
20 litigation." *Benda v. Grand Lodge of International Association of*
21 *Machinists & Aerospace Workers*, 584 F.2d 308, 315 (9th Cir. 1978),
22 *cert. dismissed*, 411 U.S. 937 (1979). "[T]he greater the hardship
23 to [Plaintiff], the less probability of success must be shown."
24 *Warsoldier*, 418 F.3d at 994 (quoting *Walczack v. EPL Prolong, Inc.*,
25 198 F.3d 725, 731 (9th Cir. 1999) (internal citations omitted).

26 Under both tests, irreparable harm is the "single most
27 important prerequisite for the issuance of a preliminary
28

1 injunction." *Dominion Video Satellite, Inc. v. Echostar Satellite*
2 *Corp.*, 356 F.3d 1256, 1260 (10th Cir. 2004). Further, the Ninth
3 Circuit has held that, "'a party seeking preliminary injunctive
4 relief in a First Amendment context can establish irreparable injury
5 sufficient to merit the grant of relief by demonstrating the
6 existence of a colorable First Amendment claim.'" *Warsoldier*, 418
7 F.3d at 1001 (citations omitted). "'The loss of First Amendment
8 freedoms, for even minimal periods of time, unquestionably
9 constitutes irreparable injury,' for purposes of preliminary
10 injunction." *Id.* at 1002 (quoting *Elrod v. Burns*, 427 U.S. 347, 373
11 (1976)).

12 Under the Federal Rules of Civil Procedure (FED. R. CIV. P.), a
13 temporary restraining order may issue only upon a showing of
14 "immediate and irreparable injury, loss or damage." FED. R. CIV. P.
15 65. Regardless of the test employed, Plaintiff clearly carries the
16 burden of persuasion. It is well-settled that injunctive relief is
17 an extraordinary remedy, "'to be used sparingly, and only in a clear
18 and plain case.'" *Rizzo v. Goode* 423 U.S. 362, 378 (1979) (quoting
19 *Irwin v. Dixion*, 9 How. 10, 33 (1850)).

20 PLRA

21 In this case, the requested relief is also subject to the
22 requirements of the PLRA, specifically 18 U.S.C. § 3626(a)(2), which
23 identifies preliminary injunctive relief, as distinct from
24 "prospective relief," as an appropriate remedy with respect to
25 prison conditions:

26 In any civil action with respect to prison conditions, to
27 the extent otherwise authorized by law, the court may
28 enter a temporary restraining order or an order for
preliminary injunctive relief. Preliminary injunctive

relief must be narrowly drawn, extend no further than necessary to correct the harm the court finds requires preliminary relief, and be the least intrusive means necessary to correct that harm. The court shall give substantial weight to any adverse impact on public safety or the operation of a criminal justice system caused by the preliminary relief and shall respect the principles of comity set out in (1)(B)¹ in tailoring any preliminary relief. Preliminary injunctive relief shall automatically expire on the date that is 90 days after its entry . . .

18 U.S.C. § 3626(a)(2).² The Ninth Circuit has held that although

¹ The referenced provision "(1)(B)" states:

The court shall not order any prospective relief that requires or permits a government official to exceed his or her authority under State or local law or otherwise violates State or local law, unless - (I) Federal law requires such relief to be ordered in violation of State or local law; (ii) the relief is necessary to correct the violation of a Federal right; and (iii) no other relief will correct the violation of the Federal right.

18 U.S.C. § 3626(1)(B).

² The PLRA also mandates that a prisoner cannot bring an action with respect to prison conditions under federal law until all available administrative remedies are exhausted. 42 U.S.C. § 1997e (a). In pleadings filed February 17, 2009, Defendants argued Plaintiff's claims should be dismissed because Plaintiff had not exhausted his administrative remedies. (Ct. Rec. 28 at 7.) Defendants now concede Plaintiff has exhausted administrative remedies related to his First Amendment religious exercise and RLUIPA claims. (See Ct. Rec. 56 at 3.) The court notes that Plaintiff filed supplemental evidence on June 8, 2009, establishing that he had exhausted his administrative remedies in this matter on February 28, 2009. (Ct. Rec. 72, Ex. 1, Correspondence Reply.)

1 the PLRA affects the type of prospective injunctive relief
2 available, "it has not substantially changed the threshold findings
3 and standard required to justify an injunction." *Gomez v. Vernon*,
4 255 F.3d 1118, 1129 (9th Cir. 2001) (granting prospective and
5 retrospective relief as least restrictive means to correct
6 constitutional violations). In fashioning narrowly tailored
7 injunctive relief that meets PLRA standards, the court must be
8 mindful of its impact on the prison operations and security. Unless
9 the court orders otherwise after making specific findings required
10 by the statute, "preliminary injunctive relief shall automatically
11 expire on the date that is 90 days after its entry." 18 U.S.C. §
12 3626(a)(2).

14 Thus, exhaustion was completed well before April 21, 2009, when the
15 undersigned recommended denial of Plaintiff's first Motion for
16 injunctive relief for failure to exhaust administrative remedies.
17 (Ct. Rec. 55.) The hearing on this matter took place on April 15,
18 2009, without oral argument. Plaintiff did not receive notice of
19 exhaustion until April 30, 2009. (Ct. Rec. 72, Ex. 1.) The record
20 also includes a Declaration from Lori Scamahorn, Grievance
21 Coordinator at the Washington State Penitentiary, dated March 3,
22 2009, that states, "Mr. Jenkins has initiated a grievance" related
23 to his refusal to work because of his religious faith, but the court
24 was not informed that the grievance was exhausted on February 28,
25 2009. (Ct. Rec. 32 at 12.) The failure to bring this to the
26 court's attention in a timely manner has caused delay in these
27 proceedings.
28

DISCUSSION

A. Irreparable Harm in the First Amendment Context

Under First Amendment Free Exercise clause analysis, where a prison policy "puts substantial pressure on an adherent to modify his behavior and violate his beliefs," that policy infringes on the free exercise of religion. *Thomas v. Review Bd. of the Indiana Employment Sec. Division*, 450 U.S. 707, 718 (1981); *May v. Baldwin*, 109 F.3d 557, 563 (9th Cir. 1997). To survive constitutional scrutiny under the First Amendment Free Exercise standard, prison officials must show their policies are rationally related to a legitimate penological purpose." *Turner v. Safley*, 482 U.S. 78, 89 (1987); *Mayweathers v. Newland*, 258 F.3d 930, 937-38 (9th Cir. 2001).

In 2000, to prevent undue barriers to religious observances by persons institutionalized in state or federal institutions, Congress passed RLUIPA with the clear intent of providing heightened protection of prison inmates' religious beliefs. At the same time, Congress was mindful of "the urgency of discipline, order, safety, and security in penal institutions." *Cutter v. Wilkinson*, 544 U.S. 709, 717, 723 (2005). Under RLUIPA, no government "shall impose a substantial burden on the religious exercise of a person residing or confined to [a jail, prison or other correctional facility] . . . even if the burden results from a rule of general applicability," unless the burden furthers a "compelling governmental interest." 42 U.S.C. §§ 1997, 2000cc-1(a)-(2). To meet the RLUIPA standard, a substantial burden on religious exercise must serve that compelling interest by "the least restrictive means." *Id.* "Religious exercise" is broadly defined under RLUIPA as "any exercise of

1 religion, whether compelled by, or central to, a system of religious
2 belief." 42 U.S.C. § 2000cc-5(7)(A). Because RLUIPA imposes a more
3 heightened scrutiny of restrictions on inmates' religious exercise,
4 and contemplates a broader definition of "religious exercise," if a
5 prison policy survives RLUIPA scrutiny, it survives First Amendment
6 scrutiny.

7 Here, Plaintiff states he has practiced the Muslim faith since
8 1984, and became a member of the Shiite sect in 2002. (Ct. Rec. 66,
9 Ex. 3 at 1. Affidavit of Sidney D. Jenkins, III.) He has presented
10 uncontroverted evidence that Washington State Prison (WSP) officials
11 infringed and punished him at least five times during the past year
12 for failing to program either by working or participating in
13 educational programs, despite his consistent rejection of
14 programming offers based on his expressed belief that to work for or
15 support a non-Islamic authority would violate his religious tenets.
16 (Ct. Rec. 19; Ct. Rec. 22 at 13, Exs. 1-7; Ct. Rec. 66.) He also
17 has averred that he has been in the Washington State penal system
18 for ten years and has neither worked nor been punished in other
19 State facilities because of his refusal to work for religious
20 reasons. (Ct. Rec. 66 at 10; Ct. Rec. 22 at 13.) He claims that
21 "no other W.S.P. inmate who has refused to program, is repeatedly
22 harassed to program. They are left alone until they themselves
23 decide to do differently." (Ct. Rec. 66 at 11-12.) He argues that
24 WSP officials' pattern of infracting and punishing him is an
25 unconstitutional attempt to coerce him into violating his religious
26 beliefs. Although the job offers, infractions and sanctions for
27 refusing to work apparently have stopped, and Plaintiff is no longer
28

1 confined to cell assignment (Ct. Rec. 66 at 6; Ct. Rec. 64 at 14),
2 Plaintiff claims new coercion is being applied by the prison
3 officials who now refuse to transfer him to medium custody facility,
4 a transfer for which he is allegedly otherwise eligible. He
5 supports this assertion with prison documentation. (Ct. Rec. 66 at
6 11; *id.* at Ex. 2, State of Washington DOC Custody Review, p. 3 of
7 4.)

8 Defendants respond that the Ninth Circuit "has found no
9 constitutional violation in statutes that require prisoners to work
10 or to program." (Ct. Rec. 4 at 7.) It is noted, however, that
11 cases cited in support of this argument are not First Amendment
12 cases. Rather, they involve the application of the Fair Labor
13 Standards Act to prisoner "employees." *Morgan v. MacDonald*, 41 F.3d
14 1291 (9th Cir. 1994); *Burleson v. State of Cal.*, 83 F.3d 311 (9th Cir.
15 1996); *Hale v. State of Ariz.*, 993 F.2d 1387 (9th Cir. 1993). In
16 these cases inmates were not objecting to prison work for religious
17 reasons. Further, Plaintiff does not challenge the constitutionality
18 of the prison work program; he challenges the constitutionality of
19 programming policies that burden his religious practices without a
20 compelling governmental interest or least restrictive alternative.

21 Defendants also contend Plaintiff has not supported his motion
22 "with the declaration of a Muslim Imam or other religious cleric"
23 that his religious beliefs are being substantially burdened. (Ct.
24 Rec. 64 at 3.) However, Plaintiff has submitted Islamic texts which
25 he interprets as a direct prohibition against supporting a non-Islam
26 authority. (Ct. Rec. 22, Ex. 1; Ct. Rec. 66, Ex. 1.) As found by
27 the Supreme Court, "it is not within the judicial ken to question
28

1 the centrality of particular beliefs or practices to a faith, or the
2 validity of particular litigants' interpretations of those creeds."
3 *Hernandez v. C.I.R.*, 490 U.S. 680, 699 (1989) (emphasis added).
4 Further, under the RLUIPA standard, Plaintiff need not show that his
5 belief is one "central" to the Muslim faith. 42 U.S.C. § 2000cc-
6 (5)(7)(A).

7 Consistent with the Supreme Court's disapproval of the
8 "centrality" test, the Ninth Circuit has ruled that a belief
9 "sincerely held" and "rooted in religious belief" is entitled to
10 constitutional protection without regard to whether the belief is a
11 central tenet to a recognized faith. *Shakur v. Schriro*, 514 F.3d
12 878, 884-85 (2008); see also *Koger v. Bryan*, 523 F.3d 789, 799 (7th
13 Cir. 2008) (in RLUIPA action, clergy verification insufficient to
14 override inmate's "sincerely held" religious beliefs). Thus,
15 Plaintiff has presented a colorable free exercise claim under the
16 First Amendment. *Thomas*, 450 U.S. at 717-718 (conditioning receipt
17 of State benefits on conduct prohibited by applicant's religious
18 beliefs is a substantial infringement on free exercise); *Warsoldier*,
19 418 F.3d at 1001; *Sammartano v. First Judicial Dist. Court*, 303 F.3d
20 959, 973-74 (9th Cir. 2002); see also *May*, 109 F.3d at 563. Having
21 presented this colorable First Amendment claim, Plaintiff
22 establishes the requisite irreparable harm. *Warsoldier*, 418 F.3d at
23 1001; *Sammartano*, 303 F.3d at 773-74.

24 **B. Likelihood of Success on the Merits**

25 Although the likelihood of success on the merits of Plaintiff's
26 religious exercise claims cannot be determined conclusively on the
27 record before the court, the Ninth Circuit has held that the
28

1 demonstration of a colorable First Amendment claim is sufficient to
2 establish irreparable injury that merits the grant of preliminary
3 injunctive relief. *Warsoldier*, 418 F.3d at 1001-02; *Mayweathers*,
4 258 F.3d at 938. Further, as discussed above, a showing of probable
5 success is less compelling where there is a strong showing of
6 irreparable harm.

7 **C. Serious Question/Balance of Hardship Alternative Standard**

8 Plaintiff, in his extensive briefing, has raised serious
9 questions going to the merits the case, not the least of which is
10 whether DOC and WSP programming policies that burden Plaintiff's
11 religious exercise serve a compelling government interest, and if
12 so, whether the government provides the least restrictive means to
13 serve that interest. Finally, the balance of hardships tips in
14 favor of Plaintiff. Although Plaintiff was not being disciplined
15 for failure to program at the time his reply was filed, there is no
16 indication in the record that the infractions and loss of privileges
17 could not resume. Indeed, the record indicates Plaintiff is being
18 denied transfer reclassification unless he programs, or prevails in
19 this litigation. (Ct. Rec. 66, Ex. 2, Custody Review, at p. 3 of
20 4.) Further, there is no evidence to establish a detriment to
21 prison operations as a result Plaintiff's refusal to program.
22 Although Plaintiff has offered the alternative of cell assignment as
23 a least restrictive means of meeting the prisons need for security
24 and order, Defendant Lori Scamahorn states Plaintiff is no longer
25 assigned to his cell during the time allotted for programming. (Ct.
26 Rec. 64 at 14.) Thus, Plaintiff's refusal to program for religious
27 reasons does not seem to be causing a hardship to prison order or
28

1 security.³

2 Defendants' argument that Plaintiff has not articulated a
3 hardship because he is not working and, therefore, not violating his
4 religious beliefs, is not persuasive. As discussed above, the
5 pressure to choose between forsaking sincerely held religious
6 practices or receipt of prison privileges and transfer eligibility
7 is sufficient hardship to warrant narrowly tailored injunctive
8 relief. Thus, Plaintiff has met the alternative standard for
9 preliminary injunction.

10 **D. Remedy**

11 The PLRA mandates preliminary injunctive relief be narrowly
12 tailored and extend no further than necessary to correct the harm
13 found. The court is mindful that the State and DOC have a
14 compelling governmental interest in maintaining security and order
15 in its facilities. Accordingly,

16 **IT IS RECOMMENDED** Plaintiff's Renewed Motion for Temporary
17 Restraining Order and Preliminary Injunction (**Ct. Rec. 58**) be
18 **GRANTED** as follows:

19 1. The court issue a preliminary injunction enjoining
20 Defendants as follows:

21 a. Defendants may offer Plaintiff work assignments or
22 educational programming, but shall not infract Plaintiff for
23

24 ³ Defendant's arguments that Washington State Law would be
25 violated if Plaintiff is not disciplined for failure to work is also
26 contradicted by Ms. Scamahorn's declaration that as of May 22, 2009,
27 Plaintiff was neither programming nor confined to cell assignment.
28

1 refusal to participate in programming if the refusal is for
2 religious purposes;

3 b. Defendants shall not impose punishment on Plaintiff,
4 or deny him privileges or transfer rights based solely on
5 Plaintiff's refusal to program for religious reasons;

6 2. The court find Defendants may confine Plaintiff to cell
7 assignment during program hours if Plaintiff does not participate in
8 programming for religious reasons.

9 3. The court find that the foregoing recommended relief (a)
10 extends no further than necessary to correct the threat to
11 Plaintiff's federal rights under RLUIPA; and (b) is narrowly drawn
12 and the least intrusive means necessary to correct the harm;

13 4. The preliminary injunction expire 90 days from entry of
14 the court's preliminary injunction and be subject to renewal upon a
15 showing of continued harm.

16 **IT IS ALSO RECOMMENDED** that Plaintiff's first Motion for
17 Temporary Restraining Order and Preliminary Injunction (**Ct. Rec. 22**)
18 be denied as moot.

19 **OBJECTIONS**

20 Any party may object to a magistrate judge's proposed findings,
21 recommendations or report within ten (10) days following service
22 with a copy thereof. Such party shall file written objections with
23 the Clerk of the Court and serve objections on all parties,
24 specifically identifying the portions to which objection is being
25 made, and the basis therefor. Any response to the objection shall
26 be filed within ten (10) days after receipt of the objection.
27 Attention is directed to FED. R. CIV. P. 6(d), which adds additional
28

1 time after certain kinds of service.

2 A district judge will make a de novo determination of those
3 portions to which objection is made and may accept, reject, or
4 modify the magistrate judges's determination. The judge need not
5 conduct a new hearing or hear arguments and may consider the
6 magistrate judge's record and make an independent determination
7 thereon. The judge may, but is not required to, accept or consider
8 additional evidence, or may recommit the matter to the magistrate
9 judge with instructions. *United States v. Howell*, 231 F.3d 615, 621
10 (9th Cir. 2000); 28 U.S.C. § 636(b)(1)(B) and (C), FED. R. CIV. P. 72;
11 LMR 4, Local Rules for the Eastern District of Washington.

12 A magistrate judge's recommendation cannot be appealed to a
13 court of appeals; only the district judge's order or judgment can be
14 appealed.

15 The District Court Executive is directed to file this Report
16 and Recommendation and provide copies to Plaintiff, Defendants and
17 the assigned district judge.

18 DATED July 22, 2009.

19
20 S/ CYNTHIA IMBROGNO
21 UNITED STATES MAGISTRATE JUDGE
22
23
24
25
26
27
28